No. 210

In the Supreme Court of the United States

OCTOBER TERM, 1939

J. EARL MORGAN, EXECUTOR OF THE ESTATE OF ELIZABETH S. MORGAN, DECEASED, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

INDEX

CITATIONS

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OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 91–96) is reported in 36 B. T. A. 588. The opinion of the Circuit Court of Appeals (R. 112–122) is reported in 103 F. (2d) 636.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 22, 1939. (R. 124.) The petition for writ of certiorari was filed July 19, 1939, and was granted October 9, 1939. The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether certain powers of appointment, which the decedent exercised by her last will, were general powers of appointment within the meaning of Section 302 (f) of the Revenue Act of 1926, as amended.

STATUTE AND REGULATIONS INVOLVED

Revenue Act of 1926, c. 27, 44 Stat. 9, as amended by Section 803 (b) of the Revenue Act of 1932, c. 209, 47 Stat. 169:

> SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> * * * * *
>
> (f) To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, or (2) by deed executed in contemplation of or intended to take effect in possession or enjoyment at or after his death, * * * except in case of a bona fide sale for an adequate and full consideration in money or money's worth; * * *. [U. S. C., Title 26, Sec. 411.]
>
> * * * * *

Treasury Regulations 80 (1934 ed.):

> ART. 24. *Property passing under general power of appointment.*—The value of all property passing under a general power of appointment must be included in the gross estate of the person exercising the power (known as the donee, or appointor) if the power is exercised

by will and such donee dies after the enactment of the Revenue Act of 1918. * * *

Only property passing under a general power should be included. Ordinarily a general power is one to appoint to any person or persons in the discretion of the donee of the power. If the donee is required to appoint to a specified person or class of persons, the property should not be included in his gross estate. * * *

Pertinent provisions of the Wisconsin statutes upon which petitioner relies are set forth in the Appendix, *infra*, pp. 36–38.

STATEMENT

The facts as stipulated (R. 75–90) and as found by the Board of Tax Appeals (R. 91–93) may be summarized as follows:

The decedent, Elizabeth S. Morgan, died testate on May 3, 1933, a resident of the State of Wisconsin, and petitioner is the duly appointed executor of her last will and testament (R. 75, 91.) The decedent was the daughter of Isaac Stephenson, who died testate on March 15, 1918, likewise a resident of the State of Wisconsin (R. 91.)

Shortly before his death Isaac Stephenson by deed (R. 13–37) conveyed certain property in trust for a period to end twenty-one years after the death of himself and his wife. The trust deed provided that after the donor's death the trust property should be divided into parts and one part allocated to each beneficiary. The following provisions of the deed of trust related to decedent (R. 18–19, 92–93):

7. After my death and during the continuance of the trust hereby created, said Trustees shall

pay annually to my daughter Elizabeth S. Morgan the net annual income from said part numbered five (5).

If my daughter Elizabeth S. Morgan shall be living at the time of the termination of this trust, said Trustees shall transfer to her all property then in their possession constituting said part five (5).

If my daughter Elizabeth S. Morgan should die prior to the termination of said trust, then said Trustees shall pay annually the net annual income from said part five (5) to such person or persons as she may appoint by her last will and testament duly admitted to probate, and at the termination of this trust said Trustees shall transfer the property then in their possession constituting said part five (5) to such person or persons as she may appoint in the manner aforesaid.

If my daughter Elizabeth S. Morgan, dying as aforesaid, should fail to make such appointment * * * or making an appointment * * * should fail to dispose of the entire net annual income of said part five (5) or of the property constituting said part five (5) at the termination of said trust, then and in any such event the annual income from said part five (5), or the part thereof not disposed of * * * shall be paid annually by said Trustees to her issue surviving * * *; and at the termination of said trust, said Trustees shall transfer all the property then in their possession, constituting said part five (5), or the part thereof not disposed of * * * to the then surviving issue of my said daughter, * * *.

In addition to this *inter vivos* trust, Isaac Stephenson also created a testamentary trust. By his will (R. 38–73) he devised his residuary estate in trust for the benefit of his wife, his children and certain of his grandchildren. The trust estate was divided into nine equal parts and the trustees were directed to hold one of such parts for the benefit of each of the testator's children. Each child was to receive the income from his or her part annually and a certain portion of the principal at the end of four, eight and twelve years after the testator's death, and the entire remaining principal at the end of sixteen years after his death, provided the child was living at the end of each of the four stated periods. The provision for the decedent was as follows (R. 48–49):

> Item Fifteen. I direct said trustees to pay to my daughter Elizabeth S. Morgan annually the net annual income from part numbered five (5) into which my trustees shall have divided my estate as aforesaid. * * *
>
> I give, devise and bequeath to the appointee or appointees of my daughter Elizabeth S. Morgan by her last will and testament all property of any nature and kind in the hands of my said trustees at the time of her death constituting said part five (5) and all property that shall thereafter be added to said part five (5) from any other part. * * *

The testamentary trust further provided that, should decedent die without exercising the power of appointment, the then undistributed portion of her part should go to her issue and, in the event of her death without issue, the then undistributed portion of her part should

be equally divided and distributed among the other remaining parts into which the estate was divided (R. 49–50).

Both the will and the deed of trust contained a provision (will, R. 61–62; deed of trust, R. 26–27) that whenever in the judgment of the trustees there was danger that any portion of the trust property, whether income or corpus, coming to "any beneficiary" of the trust, would be "dissipated or improvidently handled through intemperate or spendthrift habits, lack of business capacity, or subjection to the injurious influences of others affecting business capacity, or for any other reason or reasons" the trustees should withhold "from every such beneficiary" the whole or any portion of the trust property, whether of income or corpus. Both instruments further provided that in the event of such a withholding the trustees might pay to the unworthy beneficiary only so much of the portion, otherwise coming to the beneficiary, as the trustees deemed advisable, or might expend the income or corpus for the benefit or support of the unworthy beneficiary. In addition the trust deed provided (R. 27) that whatever was "once withheld, as above provided, from any such unworthy beneficiary" and not expended for his or her benefit and support, should be paid by the trustees to such issue of the unworthy beneficiary as would have taken the property so withheld, in case the unworthy beneficiary had died intestate at the time of the withholding. In the event of failure of issue the trustees were to distribute the property so withheld among the other then remaining parts of the trust. (R. 27.) Under the testamonetary trust, the portion "once withheld" from an

"unworthy beneficiary" and not expended for his or her benefit or support was to be paid and transferred by the trustees "to such other worthy beneficiaries under my will" as would have been entitled to the property "in case such unworthy beneficiary had died." (R. 61.)

During her life, decedent received the income from the two trusts as directed by her father. She also received the distributions of principal payable to her from the testamentary trust at the end of the fourth, eighth and twelfth years after the death of her father, as provided in his will, but she did not receive the distribution payable to her at the end of the sixteenth year because of her prior death. (R. 76, 93.)

By her last will and testament (R. 79–90), decedent exercised the power of appointment given to her by her father's deed of trust, and also exercised the power of appointment given to her by her father's will as to that portion of the testamentary trust which she would have received, had she lived, at the end of the sixteenth year after her father's death. The appointments were made in the following words (R. 82, 84–85, 93):

> Now therefore, by virtue of said power of appointment and in accordance with the provisions of said last will and testament of my father, Isaac Stephenson, I do hereby nominate, constitute, authorize and appoint my husband, J. Earl Morgan, * * *, to receive all property of any and every nature and kind in the hands of said trustees under the will of my father, * * *.
>
> * * * * *
>
> Now therefore, by virtue of said power of appointment and the provisions of said trust deed

so made by my father as aforesaid dated May 12, 1917, I do hereby appoint my husband, J. Earl Morgan, to have and receive * * *.

* * * * *

The Commissioner of Internal Revenue determined (R. 11) that both powers which decedent exercised by will were "general" powers of appointment; and that the value of the property passing under the powers should be included in decedent's gross estate, for estate tax purposes, under Section 302 (f) of the Revenue Act of 1926, as amended by Section 803 (b) of the Revenue Act of 1932. The Board of Tax Appeals approved the Commissioner's action (R. 91–96), and the court below affirmed (R. 112–124).

SUMMARY OF ARGUMENT

Section 302 (f) of the Revenue Act of 1926 provides for the inclusion in the gross estate of a decedent of the value of any property passing under a general power of appointment exercised by the decedent by will. This provision has been a part of the federal estate tax law since the enactment of the Revenue Act of 1918. Although neither the 1918 Act nor any subsequent revenue act has defined a "general power of appointment", the Treasury Regulations have consistently defined it as a power to appoint to any person or persons in the discretion of the donee of the power. The repeated reenactment without change of the tax provision shows that Congress has adopted this administrative construction. The decisions of the various Circuit Courts of Appeals, without exception, are in accord with the Treasury Regulations in defining a general power as one to appoint to any person or persons in the discre-

tion of the donee of the power. And in two cases decided by this Court which involved powers to appoint by will to any persons the donee chose, this Court characterized the powers as general in nature.

Petitioner's contention that the determination of whether the powers here involved are general or special depends upon the manner in which such powers are characterized by Wisconsin law is entirely devoid of merit. This Court has consistently held that in the interpretation of the words used in a federal revenue act, it is the will of Congress as expressed in the statute and the decisions construing it, and not the local law, which controls. "The state law creates legal interests but the federal statute determines when and how they shall be taxed." *Burnet* v. *Harmel*, 287 U. S. 103, 110. Congress clearly did not intend the taxability of property passing under a power of appointment to be dependent upon the divergent characterizations accorded by different states to precisely the same power. The obvious intention of Congress was to provide a uniform rule of nation-wide application.

Moreover, petitioner is, we believe, in error in his interpretation of the Wisconsin law. His contentions with respect to Wisconsin law were rejected by the Board of Tax Appeals after full consideration and, in our view, the decision of the Board in this respect is clearly correct.

Nor is there merit in petitioner's suggestion that certain "spendthrift" provisions in the trust instruments authorizing the trustees to withhold payments from "unworthy" beneficiaries limit the generality of decedent's powers of appointment. Analysis of the

deed of trust and the will clearly indicates, as the court below held, that the trustees' power to withhold applies only to the named beneficiaries of the trust and not to appointees of the named beneficiaries and that the trustees therefore had no veto power whatever over appointments made by decedent. Moreover, it seems clear that, even if the power to withhold did apply to appointees, it would not convert decedent's otherwise general power into a special power.

Petitioner's contention that the application of Section 302 (f) of the Revenue Act of 1926 to this case is invalid as retroactive because the powers of appointment were given to decedent in 1917 and 1918, prior to the first enactment of the tax, is not available to him. The question was not raised by the pleadings before the Board, by the petition for review by the Circuit Court of Appeals, nor by the petition for a writ of certiorari. In any event, the contention is without merit. The tax is not on the grant of the power to the decedent but upon the decedent's exercise of the power, which did not occur until 1933. Since the decedent's exercise of the power is the generating source of the appointee's title, it is clearly a proper subject of the estate tax.

ARGUMENT

I

UNDER SECTION 302 (f) OF THE REVENUE ACT OF 1926 A POWER TO APPOINT TO ANY PERSON OR PERSONS IN THE DISCRETION OF THE DONEE OF THE POWER IS A GENERAL POWER OF APPOINTMENT

The provision in Section 302 (f) of the Revenue Act of 1926 for the inclusion in the gross estate of a decedent of the value of any property passing under a

general power of appointment exercised by the decedent by will has been an integral part of the federal estate tax law since the enactment of the Revenue Act of 1918 (c. 18, 40 Stat. 1057, 1097, Sec. 402 (e)).[1]

Neither the 1918 nor any subsequent revenue act has defined a "general power of appointment." However, in Article 30 of Treasury Regulations 37, promulgated under the Revenue Act of 1918, a general power is defined as "one to appoint to any person or persons in the discretion of the donee." Substantially the same definition has been contained in all later regulations, the only change, until 1937, being the addition of the word "ordinarily" in the 1924 and subsequent regulations.[2] The repeated reenactment

[1] The House Ways and Means Committee, in recommending amendment of the estate tax law to provide for the inclusion in the gross estate of the decedent of property passing under a general power of appointment, stated (H. Rep. No. 767, 65th Cong., 2d Sess., pp. 21–22): "There has also been included in the gross estate the value of property passing under a general power of appointment. * * * A person having a general power of appointment is, with respect to disposition of the property at his death, in a position not unlike that of its owner. The possessor of the power has full authority to dispose of the property at his death, and there seems to be no reason why the privilege which he exercises should not be taxed in the same degree as other property over which he exercises the same authority. * * *"

[2] Article 25, Treasury Regulations 63 (1922 ed.); Article 24, Treasury Regulations 68 (1924 ed.); Article 24, Treasury Regulations 70 (1926 and 1929 eds.); Article 24, Regulations 80 (1934 ed.). The 1937 edition of Treasury Regulations 80 added a few phrases to make the definition read as follows: "Ordinarily a general power is one to appoint to any person or persons in the discretion of the donee of the power, or, however limited as to the persons or objects in whose favor the appointment may be made, is exercisible in favor of the donee, his estate, or his creditors."

without change of the provisions first contained in the Revenue Act of 1918 relating to property passing under a general power of appointment, in the light of the administrative definition of a general power, shows that Congress has adopted the administrative construction. *McFeely* v. *Commissioner*, 296 U. S. 102, 108; *Morrissey* v. *Commissioner*, 296 U. S. 344, 355; *Helvering* v. *Reynolds Co.*, 306 U. S. 110, 114–115; *Brewster* v. *Gage*, 280 U. S. 327, 337.

Judicial decision, without exception, has been in accord with the Treasury Regulations in defining a general power as one to appoint to any person or persons in the discretion of the donee of the power. *Johnstone* v. *Commissioner*, 76 F. (2d) 55 (C. C. A. 9th), certiorari denied, 296 U. S. 578; *Commissioner* v. *Nevius*, 76 F. (2d) 109 (C. C. A. 2d), certiorari denied, 296 U. S. 591; *Old Colony Trust Co.* v. *Commissioner*, 73 F. (2d) 970 (C. C. A. 1st); *Stratton* v. *United States*, 50 F. (2d) 48 (C. C. A. 1st), certiorari denied, 284 U. S. 651; *Leser* v. *Burnet*, 46 F. (2d) 756 (C. C. A. 4th); *Blackburne* v. *Brown*, 43 F. (2d) 320 (C. C. A. 3d); *Fidelity-Philadelphia Trust Co.* v. *McCaughn*, 34 F. (2d) 600 (C. C. A. 3d), certiorari denied, 280 U. S. 602; *Whitlock-Rose* v. *McCaughn*, 21 F. (2d) 164 (C. C. A. 3d). Although this Court has never had occasion to pass specifically on the question, its opinions in *United States* v. *Field*, 255 U. S. 257, and *Helvering* v. *Grinnell*, 294 U. S. 153, characterized the powers there involved, which were powers to appoint by will to anyone whom the donee chose, as "general powers." See also Farwell on *Powers* (2d ed.), p. 7; Underhill on the

Law of Wills (1900 ed.), Vol. 2, pp. 1163, 1176; Sugden on *Powers* (8th ed.), p. 394.

Petitioner does not deny that, apart from certain "spendthrift" provisions of the trust instruments, which are discussed in point II *infra*, the will and deed of trust gave the decedent power to appoint to any person or persons in her sole discretion, but contends that the determination of whether such a power is "general" or "special" within the meaning of the Revenue Act depends upon the manner in which such a power is characterized under Wisconsin law, rather than upon the interpretation which the federal courts have given to the federal tax statute. Petitioner urges that, under Wisconsin law, the power vested in the decedent is characterized as "special."

For the reasons stated below (pp. 18–22, *infra*) we believe petitioner to be in error in his interpretation of the Wisconsin law. But, in our view, Wisconsin law as to what constitutes a general or a special power of appointment is entirely immaterial to the decision of this case; if, under Wisconsin law, the language of the will and deed of trust vested in the decedent unlimited power to appoint to any person or persons, the power satisfies the definition of a general power as that term is used in Section 302 (f), however the power may be characterized by the Wisconsin law.

There is an impressive list of decisions by this Court holding that in the interpretation of the words used in a federal revenue act, it is the will of Congress as expressed in the statute and the decisions construing it, and not the local law, which controls. *Lyeth* v. *Hoey*,

305 U. S. 188, 193; *Heiner* v. *Mellon*, 304 U. S. 271, 279; *Thomas* v. *Perkins*, 301 U. S. 655, 659; *Palmer* v. *Bender*, 287 U. S. 551, 555–556; *Bankers Coal Co.* v. *Burnet*, 287 U. S. 308, 310–311; *Burnet* v. *Harmel*, 287 U. S. 103, 110; *Weiss* v. *Wiener*, 279 U. S. 333, 337; *Burk-Waggoner Oil Ass'n.* v. *Hopkins*, 269 U. S. 110.

As pointed out in *Burnet* v. *Harmel*, *supra*, state law creates legal interests but the federal law determines when and how they shall be taxed. There this Court held that a Texas gas and oil lease, which under Texas law was classified as a sale, was not the type of transaction constituting a sale within the contemplation of the federal statute taxing capital gains. The guiding principle was stated as follows (287 U. S. at 110):

> Here we are concerned only with the meaning and application of a statute enacted by Congress, in the exercise of its plenary power under the Constitution, to tax income. The exertion of that power is not subject to state control. It is the will of Congress which controls, and the expression of its will in legislation, in the absence of language evidencing a different purpose, is to be interpreted so as to give a uniform application to a nation wide scheme of taxation. * * * State law may control only when the federal taxing act, by express language or necessary implication, makes its own operation dependent upon state law. * * *

More recently, in *Lyeth* v. *Hoey*, 305 U. S. 188, a case dealing with the federal estate tax, this Court recognized that the taxpayer's status as an heir was to be determined by state law, but that when, pursuant to a compromise agreement among the heirs, a distribution

was made, the question whether the property so received was "acquired by inheritance", within the meaning of the federal taxing statute, was necessarily a federal question, determination of which could not be affected by "local characterization" (p. 193).

Even apart from these authorities, it seems entirely clear as a matter of principle that Congress did not intend the taxability of property passing under a power of appointment to be dependent upon the divergent characterizations accorded by different states to precisely the same power. The obvious intention of Congress was to provide a uniform rule of nation-wide application. See *Lyeth* v. *Hoey, supra,* at 194; *Thomas* v. *Perkins,* 301 U. S. 655, 659; *Burnet* v. *Harmel, supra,* at 110; *Weiss* v. *Wiener, supra,* at 337.

There is nothing to the contrary in the decisions of this Court upon which petitioner relies: *Lang* v. *Commissioner,* 304 U. S. 264; *Sharp* v. *Commissioner,* 303 U. S. 624; *Blair* v. *Commissioner,* 300 U. S. 5; *Frueler* v. *Helvering,* 291 U. S. 35; *Poe* v. *Seaborn,* 282 U. S. 101. All of these cases merely hold that state law is controlling in determining the nature of the legal interest which the taxpayer had in the property or income subject to taxation. They do not hold or suggest that, after the nature of such interest is established, the descriptive terminology which may be applied to the interest by local law is relevant in determining whether it comes within the terms of the revenue act. Cf. *Palmer* v. *Bender,* 287 U. S. 551, 555–556.

Blair v. *Commissioner, supra,* is typical of these cases. The question there involved was whether the

beneficiary of a testamentary trust was taxable upon trust income which he had assigned to his children prior to the tax years and which the trustees had paid to them accordingly. This Court held (p. 9) that the question whether the trust was a spendthrift trust, barring voluntary alienation of his interest by the beneficiary, depended upon local law. But having determined that, according to local law, the trust was not a spendthrift trust and the assignments were therefore valid, the Court stated (p. 11) that the remaining question—i. e., whether, treating the assignments as valid, the assignor was still taxable upon the income under the federal income tax act—was a federal question.

Leser v. *Burnet,* 46 F. (2d) 756 C. C. A. 4th), and *Whitlock-Rose* v. *McCaughn,* 21 F. (2d) 164 (C. C. A. 3d), upon which petitioner places great reliance, are in entire accord with the position for which we contend. In *Leser* v. *Burnet,* which likewise involved a transfer of property passing under the exercise of a power of appointment, the court first determined, independently of any local statute or court decision, the meaning of "general power" as used in the revenue act and held that such a power is "one which may be exercised by the donee of the power in favor of any person whomsoever including the donee himself or his own creditors" (46 F. (2d) at 758). The court then said that it was necessary to determine whether the particular power involved was "a general power within this meaning of the act of Congress" and stated that this was to be determined by the law of Maryland (p. 760). Since, under Maryland law, the power in question could not

be exercised in favor of the donee's creditors, the court concluded that it did not come "within the meaning of a general power of appointment as that term is used in the language of the revenue act" (p. 761). Thus the same approach was used in the *Leser* case as in the case at bar: state laws were examined to determine the precise scope of the power created by the language in the grant and, this having been determined, the question of whether a power of such scope came within the definition of a general power for purposes of the revenue act was decided as a matter of federal law.

Whitlock-Rose v. *McCaughn, supra,* enunciates the same principle. The question there involved was whether a power of appointment exercisable only by will was a general power within the meaning of the revenue act. The court, interpreting the Act to cover any power in which there was no restriction as to appointees, even though there was a restriction as to the method of appointment, held the power there involved to be general because under state law the donee of such a power was subject to no limitations in the choice of his appointees and the property subject to the power was subject to the donee's debts.[3]

[3] The court's statement in the *Whitlock-Rose* opinion (p. 165) that "The law of New Jersey controls this case," when read in its context in the opinion as a whole, obviously refers only to the state law with respect to the scope of the power. If this were not otherwise perfectly clear, it is made so by the subsequent decisions of the same court in *Fidelity-Philadelphia Trust Co.* v. *McCaughn*, 34 F. (2d) 600, and *Blackburne* v. *Brown*, 43 F. (2d) 320, holding, in accord with the decision of the court below in the present case, that the meaning which state law attributes to the term "general power of appointment" is not binding upon the federal courts in construing those words in the revenue acts.

The Wisconsin statute upon which petitioner relies in the present case to change an otherwise general power into a special power in no way restricts the donee's selection of appointees; it provides merely that a power authorizing the alienation of an estate or interest less than a fee shall be deemed special. While, as pointed out below (pp. 21–22, *infra*), we do not believe that the power here involved is special within the meaning of that statute, it seems entirely clear that the statute could not in any event affect the operation of the federal taxing act. The tax here is not on property but on the privilege enjoyed by the decedent in the exercise of a power. *Stratton* v. *United States*, 50 F. (2d) 48 (C. C. A. 1st), certiorari denied, 284 U. S. 651. The Revenue Act is obviously concerned with the latitude of the power rather than with the quantum of the estate passed pursuant to its exercise, for the tax is imposed upon "any property" passing under a general power of appointment. There is no basis for reading into the statute the qualification that the property must be a fee simple estate. Consequently it is immaterial that, under the Wisconsin law, the power here involved might possibly be classified as "special" because it might be held to authorize the alienation of less than a fee. See Griswold, *Powers of Appointment and the Federal Estate Tax*, 52 Harv. L. Rev. 929, 942.

The Wisconsin statute relied upon provides as follows (Wis. Stats. 1937, ch. 232):

> SEC. 232.05: *General Power.* A power is general when it authorizes the alienation in fee, by means of a conveyance, will, or charge of the

lands embraced in the power, to any alienee whatever.

232.06. *Special Power.* A power is special: (1) When the person or class of persons to whom the disposition of the lands under the power to be made are designated. (2) When the power authorizes the alienation by means of a conveyance, will, or charge of a particular estate or interest less than a fee.

These statutory provisions in terms apply only to real estate, for Section 232.02 defines a power, as used in the statute, as "an authority to do some act in relation to lands, or the creation of estates therein, or of charges thereon, which the owner granting or reserving such power might himself lawfully perform." However, in *Will of Zweifel,* 194 Wis. 428, 216 N. W. 840, the Supreme Court of Wisconsin stated (p. 436) that, although the statute applies only to real estate, it "shows the legislative purpose, which ought to be followed in the disposition of personalty." And in *Cawker* v. *Dreutzer,* 197 Wis. 98, 221 N. W. 401, the court went a step further by holding (p. 132) that the statute "applies the same rule to both real and personal property."

Under the rule of these cases it is clear that the general statutory scheme applies to personalty. But there is more difficulty in applying to personalty the specific provisions of Section 232.06, defining a special power as one which "authorizes the alienation * * * of a particular estate or interest less than a fee." There is, of course, no "estate or interest" in personal property which may properly be denominated a "fee", and the provision may therefore be applied, if at all, only by analogy.

By the provisions of the testamentary trust, a part of the trust property was held in trust for the benefit

of the decedent for life, but upon her death was to be paid outright to her appointees. While decedent may be said to have had merely a life estate, rather than a "fee" interest, in the trust property, the interest of her appointees who received the property outright seems clearly to be analogous to a "fee." As a matter of principle, therefore, the power vested in the decedent under the testamentary trust should be considered analogous to a power to authorize the alienation of the trust property in fee and, therefore, to be a "general" power within the Wisconsin statute. And the same conclusion should, we believe, be reached with respect to decedent's power under the *inter vivos* trust, where her appointees, instead of receiving the trust property outright immediately upon decedent's death, were to receive the income from the property until the termination of the trust and thereafter the principal.

We have been able to find no decision directly on the point in Wisconsin. However, in *Cawker* v. *Dreutzer, supra,* the Supreme Court of Wisconsin stated that the Wisconsin statute on powers, being "derived by adoption from New York, should have the same interpretation here as there * * *" (p. 132). The statutes of the two states are almost identical. See New York Real Property Law, Section 134. It is therefore of great significance that, under the law of New York, a power of appointment such as those involved in the present case is considered a general power. *In re Lathers' Will,* 137 Misc. 222, 243 N. Y. Supp. 380; *Farmers' Loan & Trust Co.* v. *Shaw,* 56 Misc. 201, 107 N. Y. Supp. 337; cf.; *Dana* v. *Murray,* 122 N. Y. 604.

Cawker v. *Dreutzer* itself is not, as urged by petitioner, authority for holding these powers to be special in character. That case involved a testamentary trust which provided that the income from one part of the trust property was to be paid to the plaintiff for life and that, upon her death, the principal of that part was to be paid to the appointees named by her in her will, or, in default of appointment, to certain specified legatees. Plaintiff contended that since she had a life estate in the property and an absolute power to dispose of the whole estate by will, the two estates merged and she had absolute title to the property. She relied on Section 232.08 of the Wisconsin statutes (*infra,* p. 37) providing for such a merger in the event that the owner of a life estate receives "an absolute power of disposition" of the property. The court rejected the plaintiff's contention, holding that a person has "an absolute power of disposition" within the meaning of the statute only when he can dispose of the entire fee during his lifetime for his own benefit. See Section 232.12, *infra,* p. 37. The court pointed out that the testator had intended that plaintiff should not have power to alienate the property during her life and had reserved to himself the naming of the line of descent in case plaintiff failed to exercise her power of appointment. This was deemed to be an effective bar to considering the power of appointment as a power of absolute disposition of the estate.[4]

[4] The statement in petitioner's brief (p. 35) that "The 'absolute power of disposition' prayed for in the complaint is a synonym for 'general power of appointment' " is clearly erroneous. As the court held in *Cawker* v. *Dreutzer*, an "absolute power of disposi-

It is true that the court stated at the end of its opinion that the power which plaintiff had was a "special power under subdivision (2), § 232.06, because it embraces an interest less than a fee", but this statement was, as the Board of Tax Appeals held in the present case (R. 95–96), mere dictum, unnecessary and indeed irrelevant to the decision of the question presented. It does not appear that the point was argued before the court and the parties apparently made no issue as to the nomenclature prescribed in Wisconsin for such a power of appointment as plaintiff possessed. Under these circumstances, we believe that the Board of Tax Appeals was clearly correct in holding (R. 96) that the dictum should not be taken as decisive, and that, in the light of the language of the statute and of the New York decisions, the powers should be deemed to be general under Wisconsin law.

We reiterate, however, that the mere definition of general power by a state statute is not controlling in the application of the federal revenue laws. State law is looked to only to determine whether or not the rights which are taxed by the federal law exist. Under the law of Wisconsin, the decedent in the present case clearly had the right to appoint the property in question to any person or persons, and under federal law this is considered a general power of appointment.

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tion" means an absolute power to dispose of the property either by deed or by will, and does not comprehend a power to appoint by will alone. See Section 232.12 of the Wisconsin statutes, *infra*, p. 37. Under Section 232.05 of the Wisconsin statutes, on the other hand, a general power may be one limited to alienation by will alone.

II

THE "SPENDTHRIFT" PROVISIONS OF THE TRUST INSTRUMENTS DO NOT LIMIT THE GENERALITY OF DECEDENT'S POWERS OF APPOINTMENT

The powers of appointment given to decedent are in terms unrestricted. The deed of trust provides that if the decedent should die prior to the termination of the trust, the trustees should pay the income from her share "to such person or persons as she may appoint by her last will and testament", and at the termination of the trust should transfer the corpus of that share "to such person or persons as she may appoint in the manner aforesaid" (R. 18–19). Similarly, the testamentary trust provides (R. 49):

> I give, devise and bequeath *to the appointee or appointees of my daughter Elizabeth Morgan by her last will and testament* all property of any nature and kind in the hands of my said trustees at the time of her death constituting said part five (5) and all property that shall thereafter be added to said part five (5) from any other part. [Italics supplied.]

There is in this language no restriction or qualification and none should be read into it unless the intent of the donor to vary the explicit language which he used is clearly apparent from other provisions of the trust instruments, reading those instruments as a whole.

Petitioner purports to find such a restriction in certain "spendthrift" provisions contained in Article 15 of the deed of trust and Item 26 of the will. These provisions authorize the trustees to withhold payments of income or principal from "any beneficiary" under

the trust they deem to be "unworthy". Petitioner contends that these provisions give the trustees an effective veto power over the exercise of decedent's power of appointment and thus prevent that power of appointment from being general in character. The answer is two-fold: first, analysis of the deed of trust and the will clearly indicates, as the court below held, that the trustees' power to withhold applies only to named beneficiaries of the trust and not to appointees of the named beneficiaries; and, second, even if the power to withhold did apply to appointees, it would not change the character of decedent's power of appointment from a general to a special power.

1. THE TRUSTEES' POWER TO WITHHOLD DOES NOT APPLY TO APPOINTEES OF NAMED BENEFICIARIES

The provisions of Article 15 of the deed of trust and Article 26 of the will are very similar. For convenience of analysis, therefore, attention will be directed primarily to Article 15 of the deed of trust, every consideration adverted to, however, being equally applicable to Item 26 of the will.

The first paragraph of Article 15 is as follows (R. 26):

> 15. Whenever, in the judgment of said Trustees, there shall be danger that any portion or portions of the trust property *coming to any beneficiary under this trust,* whether income or corpus, as hereinbefore provided, will be dissipated or improvidently handled through intemperate or spendthrift habits, lack of business capacity, or subjection to the injurious influences of others affecting business capacity, or for any

other reason or reasons, said Trustees shall withhold, if they deem it best, from every such beneficiary the whole or any and each portion of the trust property, whether of income or corpus, coming to such beneficiary as unworthy to receive the same, and said Trustees shall pay and transfer to every such beneficiary only so much of said trust property, whether of income or corpus, otherwise coming to such beneficiary, as said Trustees shall deem advisable. *Said trustees shall, if they deem it best, instead of paying and transferring to any such beneficiary or beneficiaries any portion of said trust property, whether of income or corpus, expend the same, or any portion thereof, for the welfare and support of such unworthy beneficiary or beneficiaries.* [Italics supplied.]

The court below, analyzing the power to withhold conferred by this provision, concluded that it applied only to payments to named beneficiaries and not to payments to appointees of named beneficiaries. This conclusion, we submit, accurately reflects the donor's intention as expressed in the trust instrument looked at as a whole. The interpretation urged by petitioner not only disregards the apparent purpose of Article 15, but leads to absurd results which the donor could not have intended.

The purpose of giving the trustees the power to withhold was obviously to protect the donor's widow, children and grandchildren against their own possible improvidence. In the preamble to the trust, the donor expressly stated (R. 13) that it had been his observation that many widows and children have been unable to preserve properly the principal of the fortunes they have

inherited and that it was his desire to provide for the support of his wife and his children and his grandchildren, so that his wife should always have a sufficient income and so that his children and grandchildren should be assured a comfortable living for many years after his death. Carrying out this purpose, the donor made provision in the trust instrument for his widow, for the children of a deceased son and the children of a deceased daughter, and for another son and five daughters. These were the objects of his particular regard and solicitude. For his children he provided that, after his death and during the continuance of the trust, each should receive the net income from one part of the trust for life. If any child should die prior to the termination of the trust, the income and corpus of that part was to go to his or her appointees, or, in default of appointment, to his or her issue.

The interest of the donor in the parts of the trust set aside for his children, including that set aside for the decedent, was clearly to assure, so far as he was able, that his children would be adequately provided for during their lifetime. To accomplish this purpose he authorized the trustees, whenever they believed there was danger of dissipation of the trust property, to withhold payments from any beneficiary under the trust they deemed "unworthy" and, if they deemed it best, to expend the portion of the trust property to which such beneficiary was otherwise entitled for the welfare and support of the beneficiary. But the donor had no such interest in preserving the trust property from dissipation once his children were dead. He did not give

vested remainder interests to the issue of his children or to any particular class or classes of persons in whom he had an interest. Instead, under the trust deed each child received an unrestricted power of appointment, without any power in the trustees to veto the appointment made. The grant of such an unrestricted power of appointment is certainly inconsistent with the view that, once the appointment has been made, the trustees are under a duty to preserve the trust property from dissipation and to protect the appointees from their own improvidence.

And the provision charging the trustees with the duty of expending the trust property "for the welfare and support" of unworthy beneficiaries clearly does not apply to appointees. The beneficiaries may have appointed their creditors, corporate or otherwise; they may have appointed a charity; they may have appointed complete strangers. Certainly the donor was not concerned with whether his children's creditors, or some charity, or some stranger to himself, would properly handle the property appointed to [redacted], and certainly did not intend that his trustees should expend the trust property for their "welfare and support". As the court below observed (R. 121): "There is nowhere in either trust instrument any indication of interest in the welfare of appointees or their issue."

The conclusion that the trustees' power to withhold was intended to apply only to the named beneficiaries and not to their appointees is given conclusive support by the provision made in Article 15 for the disposition of payments withheld from an "unworthy beneficiary"

and not expended for his or her welfare and support. The provision is as follows (R. 27):

> Whatever shall have been once withheld, as above provided, from any such unworthy beneficiary under this trust and shall not have been expended by such Trustees for the benefit and support of such unworthy beneficiary, *shall be paid and transferred by said Trustees to such of his or her issue as would have taken the property so withheld, both income and corpus, in case such unworthy beneficiary had died intestate at the time of such withholding;* and in the event of there being no such issue at the time any such trust property shall be payable or transferable, then said Trustees shall pay and transfer and distribute such property so withheld to and among the then other existing remaining parts. [Italics supplied.]

As applied to the donor's children—the named beneficiaries—this provision is entirely workable since the trust deed provides for the disposition of each child's share of the trust property to his issue in the event that the child dies intestate—i. e., fails to exercise his power of appointment by will. But the provision is meaningless if interpreted to apply to an appointee, since the trust deed makes no provision whatever for payments of income or corpus to the issue of an appointee if the appointee dies intestate before the termination of the trust. The trustees could not, therefore, pay any funds withheld from an appointee and not expended for his benefit to "such of his or her issue as would have taken the property so withheld * * * in case such unworthy [appointee] had died intestate at the time of such withholding." And, even apart from this, it is

not likely that the donor would be solicitous for the welfare of the issue of appointees. If the donor's children should appoint their creditors, or strangers, as they clearly had a right to do, it would have been of no interest to the donor to have the property go to the issue of these appointees rather than to the appointees themselves. Moreover, a corporation might be appointed, and of course it could not die intestate or with issue.

The comparable provision of Item 26 of the will with respect to withheld and unexpended payments—the only portion of Item 26 which is in any material respect different from Article 15 of the deed of trust—shows equally clearly the inapplicability to appointees of the trustees' power to withhold. The provision is as follows (R. 61):

> Whatever shall have been once withheld as above provided from any such unworthy beneficiary under my will and shall not have been expended by said trustees for the benefit and support of such unworthy beneficiary, *shall be paid and transferred by said trustees to such other worthy beneficiaries under my will who would have been entitled thereto in case such unworthy beneficiary had died.* [Italics supplied.]

If an appointee is to be considered as a beneficiary under the will of the donor, as the petitioner urges, the trustees cannot identify the "worthy beneficiaries" under the will who are to receive withheld and unexpended payments, until the death of an "unworthy beneficiary" who holds a power of appointment. This follows from the fact that by the terms of the will the issue of a named beneficiary who holds a power of ap-

pointment receive the beneficiary's property interest in the testamentary trust only if the beneficiary does not exercise his power of appointment by will. Thus, if an appointee is considered a beneficiary, it cannot be determined until the death of the named beneficiary who are the "worthy beneficiaries" under the will "who would have been entitled" to the payments "in case such unworthy beneficiary had died." Obviously the intent of the testator, as expressed in the terms of the testamentary trust, was that the trustee should be able to select the worthy beneficiaries at the very time the payments were withheld from an unworthy beneficiary, which could not be done under the construction of Item 26 urged by petitioner.

Another consideration compelling the same conclusion is that under the testamentary trust, although not under the *inter vivos* trust, an appointee is entitled to the immediate possession and enjoyment of all property in the hands of the trustees at the death of the beneficiary who appointed him. This is clearly inconsistent with an intention on the part of the testator to have the trustees' power to withhold applied to appointees, since, as the court below pointed out (R. 120–121), the grant to the trustees of a power to withhold presupposes a period during which the beneficiaries do not have possession and full enjoyment of the trust property.

One other factor should be noted. In his will, the testator made the exercise of the powers of appointment granted to two of his children conditional upon their dying without issue (R. 54, 57). In the case of the

other four children, including the decedent, the right to exercise the power was not subject to this condition (R. 47, 49, 51, 52). This distinction between the conditions upon which the several powers were given strengthens the view that decedent's right to exercise the appointment was absolute. In the words of the court below (R. 121), "Having carefully chosen the grantees of powers of appointment, the testator evidenced no intention of controlling whatever property passed to any appointees."

2. EVEN IF THE TRUSTEES' POWER TO WITHHOLD DID APPLY TO APPOINTEES, DECEDENT'S POWER OF APPOINTMENT WOULD STILL BE GENERAL IN CHARACTER

Even if the trustees' power to withhold should be construed as applying to appointees, that would not change the character of decedent's power of appointment from a general to a specific power. Decedent would still have power to appoint to anyone she pleased, without restriction or limitation, and without any necessity for securing prior consent of the trustees. The only effect of the trustees' power to withhold would be to place a possible limitation upon what the appointees would receive through the appointment; it would place no limitation whatever upon the exercise of the power. As pointed out above, the test of a general power of appointment for purposes of the federal estate tax is the latitude of the decedent's power of disposition rather than the quantum of the interest of which the decedent may dispose (see p. 18, *supra*). The case is very different from *Hepburn* v. *Commissioner*, 37 B. T. A. 459, cited by petitioner, where the decedent

could exercise the power of appointment only with the written permission and approval of the trustees. Here the decedent was left free to exercise the power vested in her in any way she pleased, and the trustees' power to withhold came into operation, if at all, only after the appointment had been made and had become effective.

Shortly after deciding *Hepburn* v. *Commissioner, supra,* the Board of Tax Appeals was called upon to decide *Brown* v. *Commissioner,* 38 B. T. A. 298, which presented the very question now under consideration arising under the same trusts as are here involved. A sister of the decedent in the case at bar had died, having exercised the power of appointment given to her by her father, and her executors contended before the Board, as petitioner contends here, that the trustees' power to withhold made the decedent's power of appointment special rather than general in character. The Board rejected the contention. It expressed great doubt whether the provisions for withholding applied to appointees, but, assuming for purposes of decision that they did so apply, held that they did not render special the otherwise general power, because "they are concerned only with the method of payment of income and principal, and do not withdraw or alter in substance the beneficial enjoyment of the income or principal by the person or persons designated pursuant to the power of appointment" (p. 301).

The reason a distinction is made between a general and a special power for purposes of the estate tax is the belief that where the original testator has limited the right to appoint to certain named beneficiaries or

to a limited class of beneficiaries, it is he and not the donee of the power who in the broadest sense transmits the property to the appointees. The donee's exercise of such a limited power is treated merely as a stage in the original scheme of inheritance rather than as an independent source of transmission. See *Fidelity-Philadelphia Trust Co.* v. *McCaughn*, 34 F. (2d) 600, 604 (C. C. A. 3d), certiorari denied, 280 U. S. 602. This cannot be said of decedent's power of appointment in the case at bar. Whether the trustees have a power to withhold from appointees or not, it is the decedent, and not her father, who is in every real sense the source of the transmission to the appointees of whatever trust property they may receive. This being so, the power must be deemed general and the property passing pursuant to the power must be included as part of the gross estate of the decedent.

III

THE APPLICATION OF SECTION 302 (F) OF THE REVENUE ACT OF 1926 TO PROPERTY PASSING UNDER POWERS OF APPOINTMENT EXERCISED IN 1933 ALTHOUGH VESTED PRIOR TO THE FIRST ENACTMENT OF THE TAX IS NOT INVALID AS RETROACTIVE

Petitioner contends that the application of Section 302 (f) of the Revenue Act of 1926 to this case is invalid as retroactive because the powers of appointment were given to decedent in 1917 and 1918, prior to the first enactment of the tax, although the powers were not exercised until May 3, 1933, the date of decedent's death. This question was not raised by the pleadings before the Board of Tax Appeals (R. 2–8), by the petition for review by the Circuit Court of Appeals

(R. 101–104), nor by the petition for a writ of certiorari. It should, therefore, be excluded from the scope of review by this Court. *Zellerbach Co.* v. *Helvering*, 293 U. S. 172, 182; *Clark* v. *Williard*, 294 U. S. 211, 216; see also *Duignan* v. *United States*, 274 U. S. 195, 200; *Ana Maria Co.* v. *Quinones*, 254 U. S. 245, 251.

In any event the contention is without merit. The federal estate tax is a tax upon the privilege of transferring property at death, measured by the value of the interest transferred. *Chase Nat. Bank* v. *United States*, 278 U. S. 327, 334. There can be no dispute that property passing pursuant to the exercise of a general power of appointment is property transmitted at the death of the donee of the power and that it is the donee's exercise of the power which is the generating source of the appointee's title. It is clear, therefore, that the privilege of exercising such a power is a proper subject of the estate tax and that it is immaterial that the power was given to the decedent prior to the first enactment of the tax. *Lee* v. *Commissioner*, 57 F. (2d) 399 (App. D. C.), certiorari denied, 286 U. S. 563;[5] *Stratton* v. *United States*, 50 F. (2d) 48 (C. C. A. 1st), certiorari denied, 248 U. S. 651; cf. *Saltonstall* v. *Saltonstall*, 276 U. S. 260, 271–272; *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, 345.[6]

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[5] Disapproved only as to another point in *Helvering* v. *Grinnell*, 294 U. S. 153.

[6] In the following cases property passing pursuant to the exercise of a general power of appointment was held subject to the estate tax although the power was vested in the decedent prior to the first enactment of the tax on February 24, 1919: *Minis* v. *United States*, 66 C. Cls. 58, certiorari denied, 278 U. S. 657 (power vested in 1851); *Old Colony Trust Co.* v. *Commissioner*, 73 F. (2d) 970 (C. C. A. 1st) (power vested in 1900); *Fidelity-*

Nichols v. *Coolidge*, 274 U. S. 531, is not to the contrary. That case merely held that property conveyed in trust by transfers completed before the passage of Section 402 (c) of the Revenue Act of 1918 could not, on the donor's death after the enactment of that section, be included as part of the donor's taxable gross estate.

CONCLUSION

The decision of the Circuit Court of Appeals should be affirmed.

Respectfully submitted.

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Philadelphia Trust Co. v. *McCaughn*, 34 F. (2d) 600 (C. C. A. 3d), certiorari denied, 280 U. S. 602 (power vested in 1902); *Blackburne* v. *Brown*, 43 F. (2d) 320 (C. C. A. 3d) (power vested in 1911); *Commissioner* v. *Nevius*, 76 F. (2d) 109 (C. C. A. 2d), certiorari denied, 296 U. S. 591 (power vested in 1917).

APPENDIX

WISCONSIN STATUTE ON POWERS

Wisconsin Statutes, 1933, c. 232:

232.01 *How far abolished.*—Powers, except as authorized and provided for in this chapter, are abolished; and the creation, construction and execution of powers shall be governed by the provisions herein contained.

232.02 *Definition.*—A power is an authority to do some act in relation to lands, or the creation of estates therein, or of charges thereon, which the owner granting or reserving such power might himself lawfully perform.

232.03 *Who cannot grant.*—No person is capable, in law, of granting a power who is not at the same time capable of alienating some interest in the lands to which the power relates.

232.04 *Division of powers.*—Powers, as authorized in this chapter, are general or special, and beneficial or in trust.

232.05 *General power.*—A power is general when it authorizes the alienation in fee, by means of a conveyance, will, or charge of the lands embraced in the power, to any alienee whatever.

232.06 *Special power.*—A power is special:

(1) When the person or class of persons to whom the disposition of the lands under the power to be made are designated.

(2) When the power authorizes the alienation by means of a conveyance, will, or charge of a particular estate or interest less than a fee.

232.07 *Beneficial power.*—A general or special power is beneficial when no person other than the grantee has, by the terms of its creation, any interest in its execution.

232.08 *Life estate, when changed to fee.*—When an absolute power of disposition, not accompanied by any trust, shall be given to the owner of a particular estate for life or for years such estate shall be changed into a fee, absolute in respect to the rights of creditors and purchasers, but subject to any future estates limited thereon in case the power should not be executed or the lands should not be sold for the satisfaction of the debts.

232.09 *Power creates a fee, when.*—When a like power of disposition shall be given to any person to whom no particular estate is limited such person shall also take a fee, subject to any future estates that may be limited thereon, but absolute in respect to creditors and purchasers.

232.10 *Same subject.*—In all cases where such power of disposition is given and no remainder is limited on the estate of the grantee of the power such grantee shall be entitled to an absolute fee.

232.11 *Power to devise inheritance.*—When a general and beneficial power to devise the inheritance shall be given to a tenant for life or for years such tenant shall be deemed to possess an absolute power of disposition within the meaning and subject to the provisions of sections 232.08 to 232.10.

232.12 *What powers absolute.*—Every power of disposition shall be deemed absolute by means of which the grantee is enabled in his lifetime to dispose of the entire fee for his own benefit.

* * * * *

232.19 *Other powers prohibited.*—No beneficial power, general or special, hereafter to be created, other than such as are enumerated and defined in the preceding sections of this chapter, shall be valid.

232.20 *Rights of creditors.*—Every special and beneficial power is liable to the claims of credi-

tors in the same manner as other interests that cannot be reached by an execution, and the execution of the power may be adjudged for the benefit of the creditors entitled.

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232.36 *Who may take and convey.*—A power may be vested in any person capable in law of holding lands, but cannot be executed by any person not capable of alienating lands holden by such person.

* * * * *

232.40 *When made by will or devise, how executed.*—When a power of disposition is confined to a disposition by devise or will the instrument must be a will duly executed according to the provisions of law relating to wills of real and personal estate.

* * * * *

232.51 *Power to devise passes by will.*—Lands embraced in a power to devise shall pass by a will purporting to convey all the real property of the testator unless the intent that the will shall not operate as an execution of the power shall appear expressly or by necessary implication.

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